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No. 83-276

In the Supreme Court of the United States

OCTOBER TERM, 1983

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

MINNESOTA PUBLIC INTEREST RESEARCH GROUP, ET AL.

SELECTIVE SERVICE SYSTEM, ET AL., APPELLANTS

v.

BRADLEY BOE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF FOR THE APPELLANTS

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Appellees argue that Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748, is a bill of attainder because it meets all of the requirements identified in *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 (1977). Every aspect of this argument depends on the erroneous assumption that Section 1113 denies education benefits to those who register more than 30 days after their eighteenth birthday. Appellees also argue that Section 1113 violates the Fifth Amendment because it actually incriminates late registrants, and forces nonregistrants "to choose between incriminating themselves or forfeiting financial aid" (Br. 35). This argument

ignores the obvious fact that nonregistrants are ineligible for financial aid, and incorrectly assumes that the financial aid application process requires a registered applicant to disclose the date when he registered. Finally, appellants contend that Section 1113 violates the equal protection guarantee of the Fifth Amendment because it discriminates on the basis of wealth. This contention is frivolous.

1. Appellees argue that Section 1113 is a bill of attainder because it legislatively determines the guilt of a specific group (Br. 11-19), it inflicts punishment (*id.* at 19-27), and it dispenses with the protections of a judicial trial (*id.* at 27-29). Among other defects, each of these arguments is wholly dependent on the erroneous assumption that Section 1113 denies education benefits to those who register more than 30 days after their eighteenth birthday (Br. 15-18).

a. We showed at length in our opening brief that appellees are mistaken on the preliminary question of statutory construction (Br. 15-18, 25-28). We begin here with a few comments on the proper approach to that question.

In *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), this Court held that a direct appeal would not lie under 28 U.S.C. 1252 from a proceeding in which a federal statute was declared unconstitutional, but in which the government challenged only the district court's remedy. A unanimous Court found that "[u]nder the literal language [of the statute], a party not contesting the constitutional holding would seem to be required to proceed directly to this Court" (slip op. 8). But "the sense of the statute and the literal language [were] at loggerheads" (*ibid.*). Because a literal construction "would undermine the effectiveness of the [statute]" (*id.* at 14), and because both the structure and the legislative history of the provision pointed toward a more sensible interpretation (*id.* at 9-14 & n. 14), the Court concluded that it was proper to go beyond " 'the surface literal

meaning' " of Section 1252 to what was obviously intended by Congress (slip op. 8).

Here it is by no means clear that even "the surface literal meaning" of Section 1113 supports appellees' illogical interpretation (see Appellants' Br. 15, 17), and the structure (*id.* at 17-18), history (*id.* at 25-28),[1] and purpose (*ibid.*) clearly point in the opposite direction. It is of considerable additional significance that here—unlike in *Edwards*—the constitutionality of a statute may depend upon the issue of interpretation.[2] And it is a principle as old as "Mr. Chief Justice Marshall's admonition in *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804), * * * that an Act of Congress

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[1]Appellees fail to adduce any legislative history supporting their conclusion that Section 1113 denies aid to late registrants. They do note that Representative Simon's amendment (which allowed aid to late registrants) was defeated (Br. 18 n.11). But as Representative Stratton pointed out, the Simon amendment differed from the Solomon amendment in only one respect: it permitted an applicant for aid to "submit a statement that such person refuses to submit to such registration for religious or moral reasons." 128 Cong. Rec. H4758 (daily ed. July 28, 1982). It was that difference that was responsible for the defeat of the Simon amendment (*id.* at H4758-H4763, H4770-H4772).

[2]That is certainly true so far as appellees are concerned, since their bill of attainder argument fails, and with it their self-incrimination argument (Appellants' Br. 31-32 & n.16), unless the Court construes Section 1113 as they urge, to preclude the award of Title IV benefits to late registrants.

We, on the other hand, would argue that Section 1113 is constitutional even if it denies financial aid to late registrants. For even then the law's chief effect would be to provide an incentive to registration for young men turning 18 in the future, not to deny aid to an already fixed class of persons who have failed to register in the past. Moreover, it would still be true that the mere "denial of a noncontractual governmental benefit" to those who have already failed to register on time would not be punishment in the required sense. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960). And a law must satisfy all three of the requirements identified in *Nixon* v. *Administrator of General Services*, 433 U.S. at 468—specificity in application, infliction of punishment, and denial of judicial process—in order to qualify as a bill of attainder.

ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 500 (1979); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981).

This case is unlike *Edwards* in another way that also makes rejection of appellees' asserted literal construction of the statute even more appropriate. Section 1113 directs that "[t]he Secretary of Education, in consultation with the Director [of Selective Service], shall issue regulations to implement the requirements of this subsection." 96 Stat. 748 (§ 12(f)(4)). Such regulations, representing the combined views of the two agencies directly concerned with the legislation, were promulgated promptly after passage of the law. 48 Fed. Reg. 15578 (1983) (now codified at 34 C.F.R. 668.23 *et seq.*). Those regulations, as the district court recognized (J.S. App. 33a-34a), permit late registrants to receive aid. 34 C.F.R. 668.27(b)(1). "It is well settled that [they] * * * have the force of law so long as they are 'reasonably related to the purposes of the enabling legislation.' " *Guardians Ass'n* v. *Civil Service Commission*, No. 81-431 (July 1, 1983), slip op. 10 (Stevens, J., dissenting). The deference due such an administrative interpretation is particularly compelling "where, as here, the agency participated in developing the provision." *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). The language of Section 1113 ultimately accepted by Congress was largely, in the words of Representative Solomon, "given to us * * * by Secretary Bell with his full approval, with the full approval of the Selective Service Administration." 128 Cong. Rec. H4764 (daily ed. July 28, 1982); see *id.* at H4763.

b. If the Court agrees with our interpretation of Section 1113, nothing remains of appellees' argument (Br. 11) that the law "targets a specific individual or group." Appellees have identified no case decided by this or any other court

holding that a law aimed at future conduct is a bill of attainder. All the cases on which they rely involve legislative punishment of identifiable individuals for past action. See *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 319-320, 327 (1867); *United States* v. *Brown*, 381 U.S. 437, 438-439 n.1, 458 (1965).[3]

Indeed, even if the Court should both disagree with our interpretation of Section 1113 and accept appellees' expansive view of the bill of attainder prohibition, facial invalidation of the statute remains inappropriate. After all, the principal impact of Section 1113 (even if it does not permit late registration) is on young men who, at the time it was enacted, had not yet turned 18 but who would in the future be obliged to register. Even if one assumes that its purpose is to encourage those individuals to register on time (rather than simply to register), the law as applied to them still regulates only conduct that will occur in the future. If in *Cummings* the State of Missouri had passed a law saying that those who, in the future, engaged in armed rebellion against the United States would be ineligible to practice certain licensed professions, this Court would have been presented with a very different question. For in that case the State would not be "inflict[ing] a punishment for a past act which was not punishable at the time it was committed" (71 U.S. (4 Wall.) at 319), but would instead be adopting a regulation designed to discourage rebellion in the future. It is true that Section 1113 reaches some whose period for timely registration had already expired when Section 1113 was enacted on September 8, 1982. But the class covered by

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[3]Appellees do assert (Br. 15) that it is "of little consequence in bill of attainder analysis" that here benefits are conditioned on future conduct. But their only support for that claim is *Brown*'s statement that "[a] number of English bills of attainder were enacted for preventive purposes — * * * based largely on *past acts and associations*" (Br. 15 n.7, quoting *United States* v. *Brown*, 381 U.S. at 458 (emphasis added)).

the district court's nationwide injunction is in no way limited to them. Rather, the court enjoined the government "permanently * * * from in any way enforcing in any state" both the law and its implementing regulations (J.S. App. 36a).

c. Appellees' claim that Section 1113 inflicts punishment (Br. 19-27) rests on the same erroneous assumption that the law withholds aid from late registrants. Having made that assumption, they contend (Br. 23) that Section 1113 is penal rather than regulatory because it "acts as both a disability and a restraint," "impos[es] its sanction before any hearing," "impos[es] retribution against nonregistrants," has no alternative purpose other than punishment, and "is excessively broad" because it applies to negligent as well as willful nonregistrants. But if one starts from the opposite view and accepts the construction given the statute by the Secretary and the Military Selective Service System, those objections dissolve. The law imposes no disability or restraint because everyone (otherwise qualified) can get aid by simply doing what the Selective Service Act requires. For the same reason the law imposes neither sanction nor retribution, and has the obvious alternative purpose of encouraging registration. And given that alternative purpose, it is natural that the law should apply to negligent as well as willful nonregistrants.

Indeed, even if one assumes as appellees do that Section 1113 withholds financial aid from late registrants, it is difficult to conclude that it inflicts punishment within the meaning of the Bill of Attainder Clause. For as we made clear in our opening brief (Br. 21-22), Congress here has inflicted nothing comparable to "the 'infamous punishment' of imprisonment" or other disabilities historically associated with bills of attainder. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960). It has simply made a judgment, indisputably rational, about the appropriate method for allocating

scarce federal aid dollars (Appellants' Br. 23). Since appellees have no preexisting right to those dollars (*San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 37 (1973); see note 4, *infra*), their only dispute is over the wisdom of Congress's exercise of its spending power in this statute.

Appellees seek to bolster their claim of punitive purpose by noting that Section 1113 "is an amendment to, and is codified within, Section 12 of the Military Selective Service Act entitled 'Offenses and Penalties' " (Br. 25). See 50 U.S.C. App. (& Supp. V) 462. But that is hardly decisive of the issue of congressional intent. The sponsor of the amendment in the House, Representative Solomon, explained the reason for including it in the Military Selective Service Act (128 Cong. Rec. H4757 (daily ed. July 28, 1982)):

> The amendment which establishes an additional condition of eligibility for student financial assistance should more properly be a part of the law governing the relevant program, which is the Higher Education Assistance Act; however, because there is an immediate need for this legislation * * * and because there will be no opportunity this year to amend the Higher Education Assistance Act, which is not due for reauthorization until next year, I felt that it was imperative, as did the other body, to offer this amendment to the defense authorization bill.

An argument identical to appellees' was rejected just this Term by this Court. In *United States* v. *One Assortment of 89 Firearms*, No. 82-1047 (Feb. 22, 1984), slip op. 10 n.6, the Court unanimously held:

> Mulcahey relies heavily upon Congress' labeling of § 924 with the appellation "Penalties," arguing that inclusion of the forfeiture provision in that section demonstrates Congress' intent[illegible] to create an additional criminal sanction. This argument is unavailing;

> both criminal and civil sanctions may be labeled "penalties." Moreover, the congressional reports * * * indicat[e] that Congress was cognizant of the important differences between criminal punishment and *in rem* forfeiture.

Congress was equally aware in this case of the difference between criminal punishment and restrictions on the distribution of federal financial aid.[4]

d. Appellees recognize (Br. 27-28) that Section 1113 provides for a hearing whenever there is an issue about whether an applicant has registered. They object, however, that the law is unconstitutional because it fails to provide admitted

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[4]Appellees argue (Br. 20-22) that withholding Title IV aid from nonregistrants is similar to the restrictions on employment held invalid in *Cummings* v. *Missouri, Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), and *United States* v. *Lovett*, 328 U.S. 303 (1946). We addressed this contention in our opening brief (Br. 19-22). Realizing that *Flemming* v. *Nestor*, 363 U.S. 603 (1960), rejected an identical argument, appellees add that "the underpinnings of *Flemming* have been removed" by this Court's decisions in *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970), and *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976). Appellees' Br. 22 n.15.

Goldberg v. *Kelly* held only that AFDC "benefits are a matter of statutory entitlement *for persons qualified to receive them*" (397 U.S. at 262) (emphasis added), and that the Due Process Clause affords *qualified* recipients some protection against erroneous termination of benefits. *Mathews* v. *Eldridge* made the same point with respect to disability benefits. Indeed, *Flemming* v. *Nestor* itself noted that "[t]he interest of a covered employee under the [Social Security] Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." 363 U.S. at 611. But neither *Goldberg* nor *Mathews* v. *Eldridge* gave unqualified applicants any substantive right to receive benefits over Congress's objection. Those cases are thus silent on the question being litigated here: whether Congress may make draft registration a qualification for Title IV aid. *Flemming* v. *Nestor*, on the other hand, makes clear that doing so would not be a punishment forbidden by the Bill of Attainder Clause. 363 U.S. at 617.

nonregistrants a hearing before they are "punished" by being denied Title IV aid (Br. 28). This argument is frivolous if Congress may properly decide that nonregistrants do not qualify for assistance. In that case there is simply no factual issue on which nonregistrants have a right to be heard. The only restriction appellees have suggested on Congress's authority to impose such a qualification is that it amounts to "punishment" of a disfavored class. But, once again that claim is insubstantial, because any nonregistrant can qualify for aid by simply registering late, and because in any event the mere withholding of financial assistance is not punishment within the meaning of the Bill of Attainder Clause. See page 6, *supra*.

2. Appellees assert that Section 1113 violates their privilege against compelled self-incrimination in two ways: first, it penalizes nonregistrants "who assert the privilege by denying them access to Title IV funds * * *. Second, the statute's scheme of operation serves to incriminate those * * * who register late" (Br. 31).[5]

a. Appellees' primary Fifth Amendment argument is that Section 1113 somehow compels nonregistrants to confess that they have not registered, by penalizing them for remaining silent (Br. 32-38). Given the obvious and compelling objections to this argument, it is difficult to understand the tenacity with which appellees hold to it.

In the first place, appellees make no effort to address our objection that nonregistrants are subject to no compulsion to confess their dereliction, because they are simply ineligible for Title IV aid. One who insists on not registering would get no benefits even if he did confess to having

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[5]Appellees also argue that the law not only penalizes, but actually incriminates, those nonregistrants who assert the privilege. As we noted in our opening brief (Br. 30 n. 14), this suggestion is baseless.

violated the law. And since there is no advantage to be gained by confessing, it can hardly be said that the law offers any inducement to self-incrimination. Consider a parallel from the Internal Revenue Code: Schedule A to Form 1040 asks the taxpayer to declare what state taxes he has paid, and allows a deduction for such payments. But one who has willfully refused to pay state taxes (a crime under state law) could hardly complain that Schedule A forces him to confess to that crime. Not only is he free to skip that line on Schedule A,[6] but he would not be entitled to the deduction even if he truthfully filled it in.

In the second place, the "penalty" of which appellees speak is illusory in any event because even a willful nonregistrant can qualify for aid by registering late, and as we explain below (pages 14-15), he need not reveal his past violation in the application process. In that respect too, Section 1113 is like the Internal Revenue Code, which permits even one who has willfully failed to pay state taxes on time to take a deduction once payment is actually made. 26 U.S.C. 164(a) ("taxes shall be allowed as a deduction for the taxable year within which paid or accrued").

In the third place, appellees err in supposing that the Fifth Amendment applies in every situation where one who is silent about past criminal activity may lose a governmental benefit or suffer some detriment as a result. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-320 (1976); *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953). An applicant for employment with the federal government, for example, must fill out a Personal Qualifications Statement (Standard Form 171), which asks:

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[6]Contrast *Marchetti* v. *United States*, 390 U.S. 39 (1968), on which appellees rely (Br. 34-35). There the information requested was not tied to an optional deduction, but to gross receipts. The law in *Marchetti* also imposed an occupational tax and an obligation to register, both of which were unconditional. 390 U.S. at 42-43. Here, it is no crime for nonregistrants not to apply for Title IV assistance.

20. A. Have you ever served on active duty in the United States military service?

B. Have you ever been discharged from the armed services under other than honorable conditions? * * * If "YES", give details in item 34.

* * * * *

28. Within the last five years have you been fired from any job for any reason?

29. Within the last five years have you quit a job after being notified that you would be fired? If your answer to 28 or 29 above is "YES", give details * * * and reasons in each case.

It requires little imagination to see that answers to those questions could "furnish a link in a chain of evidence to prosecute" (Appellees' Br. 30). Yet it can hardly be supposed that the government is forbidden to ask them —or to ask, for instance, whether the applicant is a user of controlled substances (see *New York Transit Authority* v. *Beazer*, 440 U.S. 568 (1979))—simply because such questions may have the desired effect of distinguishing among those it does and does not wish to hire.

Indeed, Title IV benefits themselves are made available only to American citizens and permanent residents, and not to illegal aliens. See, *e.g.*, 34 C.F.R. 690.4(a)(4) (Pell grants). And the application which students complete to demonstrate their eligibility for assistance requires them to verify their citizenship or permanent resident status, just as the form at issue here asks the student to verify his draft registration. Many who have entered the country illegally would, by revealing that fact on the form, provide evidence that could be used to prosecute them. But they are hardly

entitled to insist for that reason that the government cease asking applicants whether they satisfy the eligibility requirements.[7]

Appellees rely on cases in which a government employee, for example, is summoned before a grand jury and ordered to testify (and to waive his immunity from prosecution based on his testimony), on pain of losing his job. See *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). But as those cases recognize:

> public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity.

Lefkowitz v. *Cunningham*, 431 U.S. at 806. Thus a policeman who has taken a bribe may be presented with the choice of testifying to that fact under immunity (and losing his job), and refusing to testify (and losing his job). When one does not have a job, but is merely filling out a job application, the issue of immunity is irrelevant because he has not been ordered to testify. But the Fifth Amendment does not entitle him to the job simply because he cannot truthfully complete the application. So too with the appellees here: they are unable truthfully to show their eligibility for financial aid, and so are ineligible for assistance.

b. Appellees also assert (Br. 38-42) that Section 1113 violates the Fifth Amendment rights of late registrants because "the statute's scheme of operation" (Br. 31) requires

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[7]Similarly, it should be pointed out that this lawful residence requirement seems to be as much a bill of attainder as the eligibility provision based on draft registration status that is under attack here.

them to disclose their crime of untimely registration. This claim too is without merit.

It is true, as we pointed out in our opening brief (Br. 17 n.7), that willful failure to register within the time fixed by Proclamation No. 4771, 45 Fed. Reg. 45247 (1980), is a criminal offense punishable under 50 U.S.C. App. (& Supp. V) 462. It is also true that one cannot register late without disclosing his untimely action, since the registration card (see 32 C.F.R. 1615.1) that a registrant fills out at the post office must be dated, and asks for the his birth date. The Military Selective Service Act nonetheless imposes a continuing obligation to register, even after the 30-day period fixed by Proclamation No. 4771 has expired. 50 U.S.C. App. 462(d).[8]

But the district court found no fault with Section 462, nor do appellees challenge its requirements here. The issue is rather the validity of Section 1113. Late registration, though otherwise punishable, does not disqualify the registrant for benefits under that section. Nor does anything in Section 1113 require the applicant for financial aid to disclose the fact of late registration. 50 U.S.C. App. 462(f)(3),

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[8]Section 462(d) provides that the statute of limitations for nonregistration shall be five years from "the last day before such person attains the age of twenty-six, or * * * [from] the last day before such person does perform his duty to register, whichever shall first occur." That provision was enacted to overcome the result of *Toussie* v. *United States*, 397 U.S. 112 (1970), which held that the failure to register was not a continuing offense. S. Rep. 92-93, 92d Cong., 1st Sess. 22 (1971). Congress deemed the provision "appropriate * * * as a deterrent to nonregistration * * * [and] as a reflection of equity to those men who comply with the Act's registration requirements and remain liable at least to age 26" (*ibid.*).

Justice White, dissenting in *Toussie*, noted that the continuing obligation to register presented no Fifth Amendment problem, since the incentive to register late (doing so starts the statute of limitations running) did not "amount to 'compulsion' for purposes of the Fifth Amendment" (397 U.S. at 134).

on which appellees rely (Br. 40), does say that schools may be required "to provide a list to the Secretary of Education or the Director of persons who have submitted * * * statements of compliance." But that presumes only that applicants for aid will verify that they have complied at the time of application, not state when they complied.

Appellees assert that the Secretary's regulations require applicants for aid to disclose the fact of late registration (Br. 40-41). Even if that were so it would call in question only the validity of the regulations, not the statute. But it is not so. The regulation to which appellees refer, 34 C.F.R. 668.26(d), establishes the method for verification to be used in academic years beginning on or after July 1, 1985 (34 C.F.R. 668.26(a)). It states:

> (d) Documentation that may be used to verify registration compliance includes —
>
> (1) A copy of the student's registration Acknowledgement Letter (SSS Form 3A or 3A-s);
>
> (2) The financial aid transcript prepared pursuant to § 668.14 bearing the student's Selective Service number; or
>
> (3) Other documentation from the Selective Service System, if approved by the Secretary and the Director of the Selective Service System.

Appellees claim that SSS Form 3A, because it includes both the applicant's birth date and date of registration, informs the school that he has registered late — information the school could presumably pass along to the Secretary or the Director. But of course the Director already has a copy of the student's Form 3A; it was the Selective Service System that sent it to the student when he registered. Moreover, the requirements of Section 668.26(a) (which do not become effective until 1985) have not been, and may never be, applied to appellees. And in any event Form 3A is only one

of three methods prescribed for verification. The other two do not require the revelations appellees find so objectionable.[9]

c. We feel obliged to point out the air of unreality surrounding appellees' claim that Section 1113 compels late registrants to incriminate themselves. As we advised the district court, no registrant has ever been prosecuted for late registration. It is the policy of the Department of Justice that no one will be prosecuted who voluntarily registers prior to the time he has been designated for investigation and possible prosecution.[10] "It is well established that the privilege protects against real dangers, not remote and speculative possibilities." *Zicarelli* v. *New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972). Cf. *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.) ("The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication."). Although we cannot say that the policy against prosecuting late registrants is immutable, the possibility that any of the appellees would be prosecuted — were they

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[9]Since 34 C.F.R. 668.26(d) does not apply to aid applications for academic years before July 1985, the Secretary and the Director have not yet had occasion to prescribe what "[o]ther documentation" — besides a financial aid transcript with the student's Selective Service number — will suffice. Until the 1985-1986 academic year the Secretary is verifying registration status through "periodic on-site program reviews." 48 Fed. Reg. 15578 (1983). The Secretary and the Director will then "review the compliance process set forth in § 668.26. If [they] determine that the requirements are not necessary, the Secretary, with the concurrence of the Director, may amend or revoke § 668.26." 48 Fed. Reg. 15578 (1983).

[10]In fact, the Department's current policy is to permit even those who have been designated for possible prosecution a last opportunity to avoid criminal charges by registering. The Department now has this policy under review. If experience demonstrates that it is undermining voluntary compliance with the registration law, it will be changed.

to register now — is sufficiently "remote and speculative" that the privilege against self-incrimination has no role to play in this case.

3. Although the district court did not reach the issue, appellees also claim that Section 1113 violates the equal protection component of due process in two ways. First, they assert that it "significantly burdens access of less wealthy nonregistrants to education and therefore amounts to invidious discrimination" (Br. 45). Second, they claim it "unleashes a dual system of Selective Service law enforcement keyed to wealth" (*ibid.*). These claims are frivolous.[11]

Appellees' claims both ultimately reduce to an assertion that Section 1113 favors wealthy nonregistrants pursuing post-secondary education over similarly situated poorer nonregistrants. But Section 1113 treats both groups in identical fashion: neither is eligible for Title IV assistance. Contrast *Vlandis* v. *Kline*, 412 U.S. 441 (1973) (nonresidents required to pay higher tuition and fees than residents); *Plyler* v. *Doe*, 457 U.S. 202 (1982) (undocumented

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[11]Several of the amici advance the argument—not addressed by the district court nor pursued by appellees here— that Section 1113 unjustifiably discriminates on the basis of gender (Amicus Br. of the University of Minnesota et al. 25-27; Amicus Br. of Swarthmore College et al. 8-9). This argument overlooks the obvious fact that men and women are not similarly situated with respect to the aims of the law. Section 1113 is written in gender-neutral terms — "Any person who is required [to register] and fails to do so * * * shall be ineligible for [Title IV aid]." It is true that only men are required to register, but this Court has already determined that that distinction between men and women is constitutionally proper. *Rostker* v. *Goldberg*, 453 U.S. 57 (1981). Appellees have not suggested that the difference in impact that Section 1113 has on men and women can be traced to any impermissible stereotype about the proper roles of men and women — *e.g.*, that women should attend college and men not. Contrast *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 729-730 (1982). The impact instead results from an intent to encourage registration, just as the impact of a veterans' preference statute results from an intent to reward service. *Personnel Administrator* v. *Feeney*, 442 U.S. 256 (1979).

school-age children denied free public education given to citizens and legally admitted aliens). Title IV, unlike Section 1113, does treat the two groups differently; but what it says is that the wealthy — unlike the less affluent — are ineligible for aid even if they do register. 20 U.S.C. 1089; Pub. L. No. 98-79, § 4, 97 Stat. 479-480. It is true that wealthy nonregistrants may still be able to pay for education that poorer nonregistrants cannot afford. But that fact alone hardly suffices to invalidate Section 1113 if, as we made clear in our opening brief (Br. 22-24), the law is rationally related to a legitimate governmental objective. *Harris* v. *McRae*, 448 U.S. 297, 322-324 (1980); *Schweiker* v. *Wilson*, 450 U.S. 221 (1981).

In any event this claim, like appellees' bill of attainder and self-incrimination claims, depends on the erroneous assumption that Section 1113 "significantly burdens" poor nonregistrants' ability to get Title IV aid (Appellees' Br. 45). If any financially needy student can qualify for assistance simply by registering late, as the statute permits, then the only thing that stands between a poor nonregistrant and federal aid is his refusal to do what the Military Selective Service Act lawfully requires.[12]

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[12]Amici Swarthmore College et al. argue that Section 1113 unconstitutionally infringes First Amendment rights held by schools themselves "to determine whom they will enroll" (Br. 16). They also contend that the law "introduces an alien element into the educational process" by requiring schools to report registration information to the government (*ibid.*). Finally, they claim that "Section 1113 may interfere with the First Amendment rights of faculty and administrators who conscientiously object to military participation" (*id.* at 18). This Court recently rejected similar claims in the context of Title IV aid in *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), slip op. 19.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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Solicitor General

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